UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LOUIS MILLER, JR., Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.	DOCKET NUMBER AT075286C0460 DATE: AUG 07 1989

Louis Miller, Jr., Atlanta, Georgia, pro se.

Marie T. Ransley, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the September 26, 1988 compliance initial decision that denied the appellant's motion for enforcement of an initial decision issued on August 8, 1986. In his petition for enforcement, the appellant requested the regional office to enforce compliance with the terms of a settlement agreement entered between the appellant and the agency on which the August 8, 1986 dismissal of the removal appeal was based. In addition, the appellant asked the

Board to order the agency to compensate him for lost wages and other benefits he would have received but for the agency's alleged noncompliance. The Board hereby GRANTS the appellant's petition for review under 5 U.S.C. § 7701(e)(1), REVERSES the compliance initial decision, and DISMISSES as premature the appellant's request for attorney fees and other benefits.

BACKGROUND

On March 16, 1986, the agency removed the appellant from the position of Custodial Worker, WG-3, for "conduct unbecoming a federal employee." *See* IAF, Tab 3, Subtabs 5, 7. Specifically, the agency alleged that the appellant made verbal and physical threats to a supervisor, and that he "pushed [his supervisor] with...[his] stomach." *See* IAF, Tab 3, Subtab 5.

The appellant filed a timely petition for appeal with the Board. Prior to the hearing, however, the parties reached a settlement in which they agreed that the appeal should be dismissed and that the Board would retain jurisdiction to enforce the settlement agreement's terms. Under the terms of the written settlement, signed by the appellant, his attorney, and the agency's representative, the appellant agreed to submit his resignation, and to relinquish any right he might have to pursue other claims which might arise from his employment with the agency. In return, the agency agreed to: (1) Retain the appellant in a

pay status for a short period; (2) compensate him for any outstanding balance of accrued or earned salary and annual leave; (3) cancel the removal action, and remove all documents related to the action, and any reference to the action, from the appellant's Official Personnel Folder (OPF); and (4) assign Mr. Becham (the Administrative Officer of the Engineering Services for the Centers for Disease Control (CDC), where the appellant had worked) to receive any future employment references about the appellant, in response to which Mr. Becham would refer only to material in the OPF. *See* IAF, Tab 9.

The administrative judge entered the agreement into the record, and found in the initial decision that it was freely entered into by the parties and lawful on its face.[1] *See Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248 (1981). He dismissed the appeal based upon the parties' settlement. *See id.*

The appellant filed a petition for enforcement of the settlement agreement on June 21, 1988, alleging that he had "substantial reason to believe" that the agency had not complied with the "express terms" of the settlement agreement. *See* Petition For Enforcement (PFE) File, Tab 1. He contended that the agency failed to abide by the agreement's paragraph 6, which stated that employment

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[1] *See Miller v. Department of Health and Human Services*, MSPB Initial Decision No. AT07528610460 (Aug. 8, 1986); *see also* Initial Appeal File (IAF), Tab 10.

inquiries were to go through Mr. Becham.[2] As a result, he asserted that the agency issued "misleading and false information" about him which prevented him from being "hired for a number of positions for which he was otherwise qualified." *See id.* The appellant requested a hearing, asked that the agency be ordered to comply with the settlement agreement, and requested compensation "for wages and other benefits he would have received but for the Agency's failure to comply" with the initial decision. *Id.* The administrative judge issued an order, directing that the agency either show proof that it was complying with the final decision, or show good cause for its noncompliance. *See* PFE File, Tab 2.

In response, the agency argued that the appellant had not specifically set forth a reason why he believed it was not in compliance with the agreement, as required by 5 C.F.R. § 1201.182. *See* PFE File, Tab 4. In support of this contention, the agency supplied an affidavit by Mr. Becham stating that since the case had been resolved, there had been only two employment inquiries about the appellant, and that in both of those instances, Mr. Becham had given him a good reference consistent with the

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[2] The agreement stated in relevant part that:

> Larry Becham, Administrative Officer, Engineering Services, CDC, will be assigned to receive employment inquiries about Louis Miller, Jr., and will refer only to material in Mr. Miller's Official Personnel Folder in response to such inquiries.

settlement agreement. *See id.* Mr. Becham's affidavit, attached to the agency response, indicated that he had received two reference checks on the appellant, only one of which (a questionnaire from the Metropolitan Atlanta Rapid Transit Authority (MARTA), in May 1988), is relevant to the case at hand. That inquiry had the words "second request" written at the top of it. However, neither Mr. Becham nor Mr. Montford, the appellant's former supervisor, had seen a previous request sent to them from MARTA. Mr. Becham responded by completing the MARTA questionnaire, which stated that the appellant had resigned for personal reasons, and that he was a "good" worker, one whom Becham would reemploy and whose employment he would recommend. *See id.*, Attachment.

The administrative judge then granted the appellant's motion for an extension of time and his motion for issuance of a subpoena *duces tecum* order for MARTA to release to the appellant certain documents from its personnel evaluation folder of the appellant. *See id.*, Tabs 5-8.

In the appellant's reply brief, he stated that he had applied for a part-time bus driver position at MARTA. Soon thereafter, a MARTA employment officer notified him that he had successfully completed the company's employment test for bus operators, and asked that he call to schedule an interview appointment. *See* PFE File, Tab 9 (Exhibit A). During the interview, however, the MARTA employment officer told the appellant that CDC had given him a "negative

reference." This reference, in a questionnaire form addressed to the CDC but not directed specifically to Mr. Becham, was signed by a Mr. Lindsay, and stated, among other things, that the appellant was removed for misconduct and he was "not a good Federal employee." The form also indicated that Mr. Lindsay would not reemploy the appellant, nor give him a favorable recommendation. *See id.* (Exhibit B). At the appellant's request, the MARTA employment officer sent a second reference request to CDC. Mr. Becham received this second request and returned it to MARTA, also noting in his reply that, "I have no record of receiving your first request." *See* PFE File, Tab 9 at p. 2. The appellant alleged that the negative reference cost him the opportunity to work at MARTA, and that the agency should be ordered to pay him the wages he would have received had he been hired and employed there, as well as his attorney fees and expenses. *Id.* at p. 3.

The agency filed an amended response to the appellant's reply brief. *See* PFE File, Tab 10. In its amended response, the agency contended that MARTA had two reference questionnaires in its personnel file for the appellant; one (unauthorized) from Mr. Lindsay, a former supervisor of the appellant, and another (authorized) from Mr. Becham. The agency argued that the appellant caused the confusion himself, by not specifically directing MARTA to "the proper and agreed upon contact" person, Mr. Becham. Because MARTA apparently did not forward its inquiry to anyone in

particular at CDC, it ended up being sent to Mr. Lindsay, who had once, several years before the appellant's resignation, been his supervisor for a short period. The agency alleged that, under the settlement agreement, the appellant had "an implied responsibility to refer prospective employers to Mr. Becham by name." Otherwise, the agency could not ensure that it would be able to meet its part of the agreement because, as happened here, the mail could be forwarded to a wrong person.

In addition, the agency stated that it remained in compliance with the settlement agreement because it took several steps to try to rectify the situation--by the agency representative's contact with MARTA, and Mr. Becham's letter informing MARTA's employment officer that he was the only person authorized to release employment information and to disregard any other replies--after it became aware of the problem through the appellant's reply brief. *See id.*, Attachments A and B. The agency asserted that MARTA had not yet made a final employment decision concerning the appellant and that MARTA had assured the agency it would disregard the unauthorized response and only consider the authorized reference from Mr. Becham. Furthermore, it maintained that the Board had no authority to grant the relief requested by the appellant; namely, compensation for wages and benefits he would have received at MARTA.

The appellant filed a supplemental reply to the agency's response. *See* PFE, Tab 11. In his supplemental

reply, he objected to the agency's "cavalier" mischaracterization of the case, and disagreed with the agency's argument that he was at fault, by not designating a specific individual at CDC for MARTA to forward its reference letter. The appellant noted that the second inquiry, although not directed at a particular individual, was forwarded to the correct person. Moreover, the appellant asserted that the agency's remedial measures in this case were ineffective. *See id.*

On August 25, 1988, the appellant's counsel withdrew from the case. *See id.*, Tab 12. The appellant then filed a *pro se* supplemental submission on August 31, 1988, which asserted that: (1) He was disqualified as a potential MARTA employee based on the negative reference that MARTA received from the agency; (2) Mr. Lindsay had no authority to send MARTA an employment reference; (3) Mr. Lindsay's action should be imputed to the agency, indicating its "clear cut malice to induce harm" to him; (4) he should be compensated for the mental anxiety he and his family were subjected to by the agency; and (5) he should be awarded attorney fees. He also asked for a continuance in the case, so that he could obtain new counsel. *See id.*, Tab 14.

The administrative judge conducted a conference in early September 1988, where he and the parties discussed the appellant's request for a continuance and the potential for a settlement between the parties. *See id.*, Tab 15. He

ordered that the record be closed on September 16, 1988. *See id.*, Tab 16.

The appellant (who did not retain new counsel) filed his final submission, another reply to the agency's August 8, 1988 amended response, on September 15. *See id.*, Tab 17. He noted that he did not receive the agency's amended response until August 25. In this submission, the appellant stated that: (1) There was no language in the settlement agreement which expressly provided that he should name Mr. Becham as a contact person for future employers; (2) in his own letter to MARTA, Mr. Becham acknowledged that, "I am the only individual who is authorized to release employment information on previous employees"; (3) it was inconceivable to him how Mr. Lindsay believed he had the authority to give him a reference, in that during his 15 years working for the agency, Mr. Lindsay was his supervisor for only 2 months or less; and (4) Mr. Lindsay's recommendation was inaccurate, in that it failed to take into account his having received either good or excellent ratings from supervisors during his tenure at the agency. He again asked for an award for attorney fees. *Id.*

The administrative judge, in denying the petition for enforcement, found that the issue of attorney fees was not properly before him in the enforcement proceeding, under 5 C.F.R. § 1201.37(a)(1). He also found that the record revealed that the agency had complied with the settlement agreement, in that Mr. Becham's response to the second

inquiry showed that he referred only to material in the appellant's OPF, resulting in a favorable reference. Additionally, he found that "the unauthorized response occurred through inadvertence, it was a one time occurrence and there is no evidence of bad faith on the part of the agency." The administrative judge found, moreover, that agency officials took immediate action to rectify the problem once it had been brought to their attention. *See* Enforcement Decision at pp. 4-5.

The appellant filed a timely petition for review, with attachments of documents already filed below. All of the arguments in the petition reiterate the arguments made before the administrative judge. *See* Petition For Review File, Tab 1. The agency has responded to the appellant's petition for review. *See id.*, Tab 3.

ANALYSIS

The Board has held that, in enforcement proceedings, the burden of proof rests on the party asserting that the settlement agreement has been breached to prove that there has been noncompliance. *See Fredendall v. Veterans Administration*, 38 M.S.P.R. 366, 371 (1988). In the instant case, then, the appellant was required to prove that there was agency noncompliance. The administrative judge, in his assessment of the facts, held that the appellant did not prove that there had been noncompliance with the settlement agreement in this case, based on the agency's one-time

inadvertent act, which it took immediate action to rectify. He did not, for example, find any evidence of bad faith on the agency's part for the one-time mishap. Enforcement Decision at pp. 4-5. He further found that the agency acted quickly to remedy the situation as best it could. Indeed, the administrative judge held that there was no underlying basis for him to find noncompliance in this case.

The appellant has made no claim that the settlement agreement was involuntarily entered into or tainted by invalidity. *E.g., Wethington v. Department of the Army*, 39 M.S.P.R. 285, 287 (1988). *See Asberry v. United States Postal Service*, 692 F.2d 1378, 1380 (Fed. Cir. 1982) ("One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." (quoting *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 630 (1948)). Furthermore, he has never asked that the settlement agreement be set aside.

However, we find that the agency breached the settlement agreement when Mr. Lindsay gave the negative reference to the appellant's prospective employer. The courts have determined that a settlement agreement of the parties is subject to the general rules of construction and enforceability regarding contracts. *See Fredendall*, 38 M.S.P.R. at 371; *see also Plymouth Mutual Life Insurance Co. v. Illinois Mid-Continent Life Insurance Co.*, 378 F.2d

389, 391 (3d Cir. 1967) ("But aside from the conduct of the parties ... where the terms of a contract are clear and unequivocal, the intent of the parties is appropriately determined form (sic) the document alone"). *See also Greco v. Department of the Army*, 852 F.2d 558, 560-61 (Fed. Cir. 1988) (settlement agreements are contracts between the parties and should be interpreted to carry out their intent).

One of the basic purposes of this settlement agreement was to assure the appellant that prospective employers would receive favorable information regarding the appellant's employment at CDC. The events in this case suggest that the appellant actually got less than he bargained for in the settlement agreement, in that the appellant's prospective employer failed to receive a positive recommendation from the agency. We must, then, conclude that the agency did not strictly adhere to its part of the agreement, and that it breached the agreement. *See Lee v. Hunt*, 483 F. Supp. 826, 832 (W.D. La. 1979) (an action to enforce a settlement agreement is analogous to an action for breach of contract), *aff'd*, 631 F.2d 1171 (5th Cir. 1980), *cert. denied*, 454 U.S. 834, *reh. denied*, 454 U.S. 1129 (1981).[3]

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[3] *See generally* RESTATEMENT OF CONTRACTS § 312 (1932) ("A breach of contract is a non-performance of any contractual duty of immediate performance. A breach may be total or partial, and may take place by failure to perform acts promised, by prevention or hindrance, or by repudiation") (quoted in 4 A. Corbin, *Corbin on Contracts* § 943 n. 1 (1951)).

The Board has no authority to grant the appellant wages he would have received had he been offered a new job. Nor may the Board award the appellant the "just restitution" he has requested. *See Kopp v. Department of the Air Force*, 37 M.S.P.R. 434, 437 (1988) (the Board lacks the authority to reimburse consequential expenses incurred as a result of an improper personnel action). The agency acted in good faith and did all that it could to remedy the problem. The appellant has not asked that the Board set aside the settlement agreement because of noncompliance and reinstate his merits appeal. Thus, there is no additional relief that the Board can grant to the appellant.

The appellant has the right to file a motion for attorney fees to the Board within twenty-five (25) days of the date of this Opinion and Order, in accordance with 5 C.F.R. § 1201.37(a)(2). Thus, his motion for attorney fees is premature and not properly raised on petition for enforcement. *See* 5 C.F.R. § 1201.37(a)(2); *Corey v. Department of Labor*, 23 M.S.P.R. 581, 582 (1984).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ Robert E. Taylor
Clerk of the Board

Washington, D.C.